

No. 07A-\_\_\_\_\_

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**In the Supreme Court of the United States**

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ALISA DEAN; RALPH DEAN; RACY DONAIE; TYRONE SMITH; RONALD DUHAN; MARY ANN  
DUHAN; MICHAEL JORDAN; KELLY PORTER; HENRY RIVERA; MARIA RIVERA; SANDRA  
THOMAS; CALVIN THOMAS,

*Applicants,*

*v.*

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS,

*Respondent.*

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**APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT OR  
DECREE PENDING THE FILING OF AND THIS COURT'S  
CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI**

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## CORPORATE DISCLOSURE STATEMENT

The applicants in this case are all individuals and, accordingly, no further disclosure is required pursuant to this Court's Rule 29.6. Nonetheless, because this application arises out of a criminal case currently being prosecuted in the United States District Court for the Southern District of Texas styled as *United States v. BP Products North America, Inc.*, Cr. No. 4:07-CR-434, applicants advise that the defendant has related corporate entities, which we understand to include:

BP Products North America, Inc.;  
BP Company North America, Inc.;  
The Standard Oil Company;  
BP Corporation North America, Inc.;  
BP America, Inc.;  
BP Corporation North America, Inc.;  
BP America, Inc.; and  
BP, p.l.c.

The criminal case arises out of an environmental crime that caused the Texas City refinery explosion of March 23, 2005, which killed 15 persons and seriously injured more than 170. In this application, we represent twelve of these victims of the explosion, specifically Alisa and Ralph Dean, Racy Donaie, Tyrone Smith, Ronald Duhan, Mary Ann Duhan, Michael Jordan, Kelly Porter, Henry and Maria Rivera, Sandra Thomas, and Calvin Thomas. In the District Court, we were joined by many other victims of the blast.

**In the Supreme Court of the United States**

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ALISA DEAN; RALPH DEAN; RACY DONAIE; TYRONE SMITH; RONALD DUHAN;  
MARY ANN DUHAN; MICHAEL JORDAN; KELLY PORTER; HENRY RIVERA; MARIA  
RIVERA; SANDRA THOMAS; CALVIN THOMAS,

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS,

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**APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT OR  
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CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable Antonin Scalia, Associate Justice of the Supreme Court of  
the United States and Circuit Justice for the Fifth Circuit:

Applicant crime victims respectfully move for a stay of the enforcement of the  
judgment and decree of the Court of Appeals pending the victims' filing of a petition  
for a writ of certiorari and this Court's disposition of the petition. *See* Rule 23.1; 28  
U.S.C. § 2101(f); 28 U.S.C. § 1651(a)-(b). The certiorari petition will present the  
question of the standard of review a court of appeals applies to a crime victim's  
petition under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, a  
nationally-significant question on which at least four courts of appeals are now  
divided.



The victims in this case were seriously injured on March 23, 2005, in the catastrophic explosion at the BP Products North America, Inc. refinery in Texas City, Texas. The explosion was one of the worst industrial accidents in American history, killing fifteen workers and severely harming 170 more. The United States soon developed sufficient evidence that the BP Products North America, Inc. had caused these deaths and injuries by committing federal crimes. To resolve the matter, federal prosecutors then secretly reached a plea agreement with BP Products. The prosecutors negotiated this agreement without conferring with the victims – a right the victims are promised in the CVRA. *See* 18 U.S.C. § 3771(a)(5) (guaranteeing victims the right “to confer with the attorney for the Government in the case”).

Once the prosecutors publicly filed the proposed agreement, the victims immediately asked the District Court to reject it because of the violation of their statutory rights. After various hearings, the District Court concluded that their rights had not been substantially violated and therefore denied the requested relief.

The victims then filed a mandamus petition in the Fifth Circuit, as directed in the CVRA. *See* 18 U.S.C. § 3771(d)(3). The Fifth Circuit stayed proceedings below and more than two months later concluded that the United States had clearly denied the victims the rights guaranteed in the CVRA. Despite these violations of the victims’ rights, however, the Circuit refused to grant the victims any relief. The Circuit concluded that a crime victims’ CVRA petition is subject to discretionary mandamus review, not ordinary appellate review. In so reasoning, the Fifth Circuit

explicitly aligned itself with the Tenth Circuit but disagreed with the Second and Ninth Circuits, both of which have held that the CVRA entitles crime victims ordinary appellate review of their applications. Under the “largely prudential” standard of traditional mandamus review, the Fifth Circuit exercised discretion to withhold relief from the victims.

The victims have satisfied the standards for obtaining a stay of proceedings pending this Court’s disposition of their petition for certiorari. Their petition will present a substantial question of national importance on which at least four Courts of Appeals are now divided – and on which two Courts of Appeals have specifically agreed with the victims’ position. Moreover, if the Fifth Circuit’s decree is not stayed, the case will go back to the District Court, which has had under advisement the issue of whether to accept the proposed plea agreement. Further consideration of the plea by the District Court will continue the denial of the victims’ right to confer with the prosecutor before any plea agreement is reached. If the District Court decides to accept the proposed plea - - as urged by both the United States and BP Products - - this outcome would effectively moot the victims’ petition for a writ of certiorari, forever forfeiting the victims’ rights under the CVRA. To maintain the status quo and avoid this irreparable injury, the victims seek a stay of the enforcement of the Fifth Circuit’s decision, pending their opportunity to file a petition for a writ of certiorari.

The victims have satisfied the requirement of this Court’s Rule 23 for seeking a stay from a Circuit Justice. On May 30, 2008, they filed a Motion for Recall of and

Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari. The motion asked for the Fifth Circuit to stay further proceeding by recalling its mandate for a period of 60 days in order to permit the victims to file a petition for certiorari. The motion was denied in a one-sentence order dated June 11, 2008.

## **STATEMENT**

### **District Court Proceedings**

This application arises out of a criminal case involving the March 23, 2005, catastrophic explosion at the BP Products North America, Inc. refinery in Texas City, Texas. The explosion killed 15 workers and seriously injured more than 170 others, including Alisa and Ralph Dean and the other applicants. Ralph rushed into a burning trailer to rescue his wife, Alisa, who suffered substantial lung damage from inhaling flames from the explosion.

After the United States was satisfied that it had sufficient information to file criminal charges against BP Products, it chose not to notify the victims of their rights and not to confer with them – rights guaranteed to crime victims by the Crime Victims’ Rights Act. 18 U.S.C. § 3771(a)(2) & (a)(5). Instead, the United States obtained *ex parte* a sealed order from a district judge directing that the government should not notify the victims of what was happening until after any plea agreement was filed with the District Court.

The United States and BP Products then reached a proposed a binding plea agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, which they then publicly filed with the District Court. The victims making this

application promptly objected that the proposed plea agreement was unduly lenient, did not provide adequate measures to prevent future accidents, and was negotiated in violation of their right to confer with prosecutors under the CVRA. After a hearing, the District Court rejected the victims' arguments regarding victims' CVRA rights. *United States v. BP Products North America, Inc.*, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008). The District Court conceded that the victims had been denied their right to inform the prosecution "of their view about the specific terms of the proposed plea agreement *before* it was signed. Given the unusual circumstances, however, this order did not frustrate the CVRA's conferral provision." Pet. App. 41a. The District Court took the victims' other objections to the agreement under advisement.

### **Fifth Circuit Proceedings**

On February 28, 2008, the applicants -- Alisa and Ralph Dean and ten other crime victims -- sought review in the Fifth Circuit. The victims followed the procedure specified in the CVRA of filing a "petition [to] the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). The victims' petition asked the Fifth Circuit to direct the District Court to reject the proposed plea agreement because it was negotiated in violation of their rights protected in the CVRA.

On February 28, 2008, the Circuit ordered that the victims' "petition for writ of mandamus is GRANTED in part. The district court is to take no further action to effect the plea agreement at issue, pending further ruling by this court . . . ." Pet. App. 45a.

On May 7, 2008, the Fifth Circuit issued a published decision holding that both the federal prosecutors and the District Court had violated the victims' rights under the CVRA. *In re Dean*, --- F.3d ---, 2008 WL 1960245 (5<sup>th</sup> Cir. 2008). The Circuit explained: “[I]t was contrary to the provisions of the CVRA for the [district] court to permit and employ the *ex parte* proceedings that have taken place – proceedings that have no precedent, as far as we can determine.” *In re Dean*, \_\_\_ F.3d \_\_\_, 2008 WL 1960245 (5<sup>th</sup> Cir. May 7., 2008) (Pet. App. 50a). Instead, “the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims’ views on the possible details of a plea bargain.” Pet. App. 51a.

Despite clear violations of the statute, the Circuit declined to award the victims’ any relief – i.e., it declined to direct the District Court to reject the plea agreement. Specifically disavowing holdings from the Second and Ninth Circuit, the Fifth Circuit followed a recent Tenth Circuit decision that the CVRA imported a “common law tradition” making mandamus relief discretionary. Pet. App. 49a, citing *In re Antrobus*, 519 F.3d 1123, 1127 (10<sup>th</sup> Cir. 2008). The Fifth Circuit then reasoned that, under that tradition, “[t]he decision whether to grant mandamus is largely prudential.” Pet. App. 53a. The Court deemed the violation of the victims’ rights an “unfortunate fact” and regretfully noted that victim impact on the final outcome of the case might be “substantially less where, as here, their input is received after the parties have reached a tentative deal.” Pet. App. 52a-53a. Nonetheless, the Fifth Circuit concluded that prudence dictated denying any relief.

It therefore lifted its stay, leaving it to the District Court to rule on the victims' other objections to the plea agreement. Pursuant to Fifth Circuit Rule 41.4, the mandate issued on the same day as the Circuit's denial of the victims' mandamus petition.

On May 15, 2008, the United States filed a motion for a thirty-day extension of time in which to file a possible petition for rehearing *en banc*. The motion noted that the Circuit's ruling on the scope of the CVRA was one "that could have broad precedential effect . . . ." On May 19, 2008, the Circuit denied the United States' request for extra time.

On May 20, 2008, the victims filed a petition for rehearing *en banc*, noting that the Fifth Circuit's decision deepened the "circuit split" that existed on the proper standard of review for CVRA petitions. The victims also explained that the Circuit's decision was at odds with the floor statement of the CVRA's sponsors that "[t]his country's appellate courts are designed to remedy errors of lower courts and this provision [in the CVRA] requires them to do so for victim's rights." 150 CONG. REC. at S10912 (statement of Sen. Kyl). On May 23, 2008, the National Crime Victims Law Institute filed an amicus brief supporting the victims' petition for rehearing, noting the importance of giving crime victims regular access to appellate courts. On June 3, 2008, the Fifth Circuit denied the victims' rehearing petition. Pet. App. 56a.

On June 5, 2008, the victims filed a Motion for Recall of and Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari. The motion asked for the

Circuit to recall its mandate for 60 days, giving the victims the opportunity to file a petition for certiorari with this Court regarding the circuit split. On June 11, 2008, a single judge of the Fifth Circuit denied the motion in a one-sentence order. Pet. App. 57a.

On June 12, 2008, the victims advised the District Court by letter that they would be filing this application and requested that the District Court not schedule any further proceedings until a ruling on the application. To date, no further proceedings have been scheduled.

### **REASONS FOR GRANTING THE APPLICATION**

#### **I. ISSUANCE OF A STAY TO PRESERVE THE STATUS QUO IS APPROPRIATE.**

The victims have met the requirements for issuance of a stay of the decision below because there is (1) “a reasonable probability that certiorari will be granted,” *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan*, 501 U.S. 1301, 1301 (1991) (Scalia, Circuit Justice), (2) “a significant possibility that the judgment below will be reversed,” *id.*, and (3) “a likelihood of irreparable harm (assuming the correctness of the [victims’] position) if the judgment is not stayed,” *id.* In addition, the equities in this case all favor granting a stay.

#### **A. There is a Reasonable Probability That This Court Will Grant Certiorari to Resolve the Four-Circuit Split on the Question of the Standard of Review for Crime Victims’ Petitions.**

The certiorari petition that the victims will file will present a nationally-significant question on which at least five courts of appeals now disagree. The Fifth

Circuit’s decision below aligned that Circuit with the Tenth Circuit. The Fifth Circuit held that a crime victim must meet the demanding common law standards for the issuance of a writ of mandamus, including demonstrating that the “right to the issuance of a writ” is “clear and indisputable.” Pet. App. 50a, citing *In re Antrobus*, 519 F.3d 1123, 1127 (10<sup>th</sup> Cir. 2008). The Fifth Circuit specifically rejected earlier decisions from both the Second and Ninth Circuits. Pet. App. 49a. (noting that both the Second and Ninth Circuits “agree with the victims” but declining to follow those decisions). The Second Circuit had held that “[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court’s decision denying relief” under the CVRA, and therefore, “a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.” *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005). Likewise, the Ninth Circuit concluded that “[t]he CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.” *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006). The Third Circuit, in an unpublished decision, has agreed with the Second and Ninth Circuits. See *In re Walsh*, 229 Fed. Appx. 58, 2007 WL 1156999 (3<sup>rd</sup> Cir. 2007). Therefore, three Circuit Courts of Appeals agree with the victims.



The victims' petition for a writ of certiorari will raise this clear and acknowledged "circuit split" as a basis for further review. The issue is not only one on which the circuits are divided, but also is of great importance. At stake is whether crime victims in future cases will be "left to the mercy of the very trial court that may have erred." 150 CONG. REC. at S10912 (statement of Sen. Kyl). Every year, thousands of crime victims in federal criminal cases have rights that are potentially implicated by the standard of review question. The issue is one which cries out for uniformity, rather than leaving appellate protection of crime victims' right to depend on the happenstance of the Circuit in which a victim is victimized.

The crime victims' petition will present a good vehicle for resolving the circuit split. The standard-of-review issue is outcome determinative in this case. The Fifth Circuit withheld relief from the victims based on the "largely prudential" nature of traditional mandamus standards. Pet. App. 53a. If ordinary appellate standards apply instead, no such avoidance of relief for the victims is possible. Also, percolation of the issue in the various Courts of Appeals in other cases is unlikely to crystallize the question further. The Fifth Circuit followed the Tenth Circuit in holding that traditional mandamus standards apply to a crime victim's CVRA petition. The Second Circuit, Third Circuit and Ninth Circuit have taken the opposite position -- that the CVRA creates a "unique regime," *Kenna*, 435 F.3d at 1017, in which victims "need not overcome the hurdles typically faced by a

[mandamus] petitioner,” *Huff*, 409 F.3d at 563. The question presented is thus a binary, yes-no proposition, on which both sides have been staked out.

In sum, in light of the disagreement among the circuits on the important issue of the appellate standard of review of claims from crime victims, there is at least a “reasonable probability” that certiorari will be granted.

**B. There is a Significant Possibility that the Decision Below Will be Reversed.**

If the Court grants the victims’ petition for certiorari, there is a significant possibility that the decision below will be reversed. The Fifth Circuit’s holding on the standard of review conflicts with well-reasoned, unanimous and published decisions of the Second and Ninth Circuits. As those Circuits have explained, the CVRA expressly allows crime victims to apply for mandamus and directs that “[t]he court of appeals *shall take up and decide* such application forthwith . . . .” 18 U.S.C. § 3771(d)(3). The Fifth Circuit violated the CVRA command by declining to “take up and decide” the victims’ application for relief. It thus failed to recognize that this language transformed a discretionary mandamus petition into a mandatory appeal.

As one leading authority on crime victims’ rights recognized:

the problem in review of victims’ rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims’ rights violations. . . . One could not credibly suggest that criminal defendants’ constitutional rights are to be reviewed only in the discretion of the court. . . .The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.

Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 347. In short, as the Second Circuit has

correctly concluded, “[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court’s decision denying relief sought under the provisions of the CVRA.” *Huff*, 409 F.3d at 562; *see also* MOORE’S FED. PRAC. 3d § 321.14[1] (2007) (“because Congress has chosen mandamus as the mechanism for review under the CVRA, the victim need not make the usual threshold showing of extraordinary circumstances to obtain mandamus relief”).

The Fifth Circuit decision also violates a cardinal rule of statutory construction that a “statute should be read to avoid rendering its language redundant if reasonably possible.” *Arana v. Ochsner Health Plan*, 352 F.3d 973, 978 (5<sup>th</sup> Cir. 2003). The Fifth Circuit interpreted the CVRA’s detailed provisions about crime victims’ mandamus petitions to mean only that a victim may petition for an ordinary, discretionary writ of mandamus. But before the CVRA’s enactment, a crime victim could (like anyone else) seek discretionary mandamus under the All Writs Act. *See* 28 U.S.C. § 1651; *see, e.g., United States v. McVeigh*, 106 F.3d 325 (10<sup>th</sup> Cir. 1997) (mandamus petition by victims of the Oklahoma City bombing). The Fifth Circuit’s decision thus renders the CVRA’s language superfluous.

The Fifth Circuit’s decision also defies the clear legislative history of the CVRA.<sup>1</sup> Senators Kyl and Feinstein were the primary sponsors of the CVRA.

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<sup>1</sup> The victims acknowledge that the Fifth Circuit Justice does not often resort to legislative history to resolve statutory constructions questions. *See, e.g., Zedner v. United States*, 547 U.S. 489, 511 (2006). (Scalia, J., concurring). In this application, however, the Circuit Justice is acting as a “surrogate for the entire Court.” *Araneta v. United States*, 478 U.S. 1301, 1303 (1986) (Burger, C.J.). Other Justices on the Court frequently resort to legislative history, particularly where (as here) it is so unequivocal.

See *Kenna*, 435 F.3d at 1015-16 (giving substantial weight to remarks of Senators Feinstein and Kyl to interpret the CVRA). Senator Kyl stated directly that the law “required” appellate courts to “remedy errors of lower courts”:

[W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims’ rights is just as important as the initial assertion of a victim’s right. This provision ensures review and encourages courts to *broadly defend* the victims’ rights.

Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country’s appellate courts are designed to *remedy errors of lower courts and this provision requires them to do so for victim’s rights*.

150 CONG. REC. at S10912 (statement of Sen. Kyl) (emphases added). Similarly, the CVRA’s sponsors stated that this appellate review provision “provides that [the appellate] court shall take the writ *and shall order the relief necessary to protect the crime victim’s right*,” 150 CONG. REC. S4270 (statement of Sen. Feinstein), and that crime victims must “be able to have denials of those rights reviewed at the appellate level, and to have the appellate courts *take the appeal and order relief*.” *Id.* (statement of Sen. Kyl). Contradicting the Fifth Circuit’s conclusion that the CVRA simply imports a “common law tradition,” Pet. App. 49a, Senator Feinstein stated directly that the Act would create “*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals . . . . Simply put, the mandamus procedure allows an appellate court to take timely action to *ensure* that the trial court follows the rule of

law set out in this statute.” 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphases added).

For all these reasons, there is a significant possibility that the decision below would be reversed on review by this Court.

**C. The Victims Will Suffer Irreparable Injury If the Stay is Not Granted.**

A stay is necessary to preserve the status quo and avoid irreparable injury to the victims. As discussed above, the central argument in the petition for a writ of certiorari will be that because the victims have proven a violation of their rights under the CVRA, they are now entitled to ordinary appellate relief – i.e., a rejection of the proposed plea agreement, sending the parties back to renegotiate in a process that protects the victims’ rights. For purposes of assessing the question of irreparable injury, a Circuit Justice “assume[s] the correctness of the applicant’s position” on the merits. *Barnes v. E-Systems, Inc.*, 501 U.S. at 1302 (Scalia, Circuit Justice). In the context of this case, then, the victims are entitled to an assumption that a favorable ruling from the Supreme Court would produce an order to the District Court to reject the proposed plea agreement.

Without a stay, the District Court will be free to continue to review – and quite possibly accept – the proposed plea agreement that the United States negotiated without consulting the crime victims. Yet, as the Fifth Circuit specifically held, in passing the CVRA, Congress specifically guaranteed crime victims are right to confer with the prosecutor on important subjects. Pet. App. 51a.

(discussing 18 U.S.C. § 3771(a)(5)). As this case currently stands, the victims were never afforded the right to confer with prosecutors about the plea agreement before it was finalized and presented to the District Court. *See* Pet. App. 51a (in this case, the CVRA required the Government to “fashion a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims’ views on the possible details of a plea bargain”). Thus, without a stay to protect their right to seek review before this Court, the victims will never receive their congressionally-mandated right.

The Fifth Circuit candidly acknowledged that it was an “unfortunate fact” that “the plea agreement was reached without the victims’ being able to participate by conferring in advance.” Pet. App. 52a. Indeed, the Fifth Circuit explicitly recognized that the “victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal.” Pet. App. 53a. Yet the Fifth Circuit’s disposition simply sends the case back to the District Court, affording the victims no assured remedy for the established violation of their right to confer before the agreement was reached.

Not only does the mere consideration of the defective plea violate the victims’ rights, but there remains a very real possibility that the District Court may ultimately accept the proposed plea – as both the United States and BP Products are urging. If the District Court accepts the plea, then BP Products will argue that the victims will have lost the ability to seek any further appellate protection of their

rights. BP Products will apparently contend that the victims are barred from any further efforts to obtain relief by 18 U.S.C. § 3771(d)(5), which authorizes a crime victims to make a motion to “re-open a plea” only if “the accused has not pled to the highest offense charged.” BP Products will argue that, because the plea agreement has it pleading guilty to the single, negotiated offense covered by the plea agreement, it has therefore pled to the highest offense charged and the victims are barred by § 3771(d)(5) from further efforts to protect their rights. If BP Products were to prevail on its argument in the District Court, then the victims’ certiorari petition would be rendered moot, as this Court would be powerless to grant the victims the relief they seek. For this reason alone, a stay should issue. *See Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (granting stay of district court order scheduling retrial because conduct of retrial “would effectively deprive this Court” of ability to consider petition for certiorari); *N.Y. Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (“Perhaps the most compelling justification” for the exercise of the stay power “would be to protect this Court’s power to entertain a petition for certiorari . . . after the final judgment of the Court of Appeals.”); *see also Kimbel v. Swackhamer*, 439 U.S. 1385, 1385 (Rehnquist, J., in chambers) (noting authority of Circuit Justice “to grant interim relief in order to preserve the jurisdiction of the full court to consider an applicant’s claim on the merits”).

**D. The Balance of Equities Decisively Favors the Victims.**

In evaluating whether to grant a stay, this Court has also “balance[d] the equities,” that is, “explore[d] the relative harms to applicant and respondent, as well as the interests of the public at large.” *Barnes*, 501 U.S. at 1305 (Scalia, Circuit Justice). Here the balance of equities lies decisively in the victims’ favor.

The victims are merely seeking preservation of the status quo for a relatively short time in which to seek further review by this Court. The Fifth Circuit entered a stay of district court proceedings on February 28, 2008. Pet. App. 45a. For more than two months, that stay was in place without apparent injury to either the United States or the defendant. The stay was lifted on May 7, 2008, when the Fifth Circuit denied the victims’ petition and, by operation of Fifth Circuit rule, the mandate issued automatically. Since then, the District Court has not scheduled any further proceedings in this matter. Granting the application and entering a stay would simply leave in place the status quo – a proposed plea agreement pending before the District Court – while the Court considers whether to grant further review.

On the other hand, if no stay is granted, then the victims will essentially have been given rights without remedies. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“where there is a legal right, there is also a legal remedy . . .”). This Court should not lightly impute to Congress the intention to enact a cruel joke – a Crime Victims’ Rights Act that would promise crime victims that in the federal criminal justice system they will be “treated with fairness,” 18 U.S.C. § 3771(a)(8), but leave that promise unfulfilled in cases such as this one. As the



Ninth Circuit has explained, “The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.” *Kenna*, 435 F.3d at 1013. Only a short stay to permit the victims to seek further review will honor the congressional commitment to crime victims.

Finally, it is noteworthy that the United States did not object below to the victims receiving any stay. The only objection came from BP Products – which asserted that it had some sort of right to a “speedy sentencing.” Respondent BP Products North America’s Opposition to Victims’ Motion for Recall of and Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari, *In re Dean*, No. 08-20125 (June 11, 2008) at 9. But in weighing the equities between innocent victims and an admitted felon, whose crime led to the deaths of fifteen innocent persons and devastating injuries to dozens more (including the applicants here), the interests of victims must take precedence. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)).

## **II. THE CVRA DOES NOT STRIP THE COURT OF JURISDICTION TO ENTER A STAY.**

For all the foregoing reasons, a stay is plainly appropriate under this Court’s established stay jurisprudence. BP Products will apparently argue, however, that

this Court's well-settled jurisprudence does not apply because of a provision in the CVRA. The provision that the defendant will apparently cite limits the ability of courts of appeals to impose a stay of longer than five days in certain circumstances.

The provision reads as follows:

Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition *the court of appeals* for a writ of mandamus. *The court of appeals* may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. *The court of appeals* shall take up and decide such application forthwith within 72 hours after the petition has been filed. *In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.* If the *court of appeals* denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion. 18 U.S.C. § 3771(d)(3).

As is readily apparent from the text, the provision pertains only to the power of the *courts of appeals* to grant a stay in some circumstances. The provision specifically mentions the "court of appeals" four times: in the three sentences leading up to the five-day stay provision and in the sentence immediately following it. Of course, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Here, read in context, the five day provision covers the courts of appeals and simply has no bearing on this application to this higher court.

This reading of the five day stay provision as covering the courts of appeals is confirmed by other language in the provision itself. The five day provision is a complementary one to the requirement that a court of appeals rule within 72 hours (i.e., three days) on any crime victim application. Given that the courts of appeals will generally rule within three days on whether to grant a victim’s application, there is generally no need for a stay of anything longer than five days. Of course, Congress did not impose any requirement that this Court rule within three days on a crime victim’s petition for a writ of certiorari – a requirement that would be an extraordinary departure from this Court’s normal procedures.

BP Products’ anticipated position that the victims cannot obtain a stay of longer than five days from this Court would also impliedly repeal the venerable statute on which the victims base their application. Under 28 U.S.C. § 2101(f), the victims are plainly entitled to seek a stay of this Court’s mandate for a reasonable period of time to file a petition for a writ of certiorari:

*In any case* in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. 28 U.S.C. § 2101(f) (emphasis added).<sup>2</sup>

This language broadly commands that “[i]n any case” the party aggrieved may seek a stay for a reasonable period of time to obtain Supreme Court review. Nothing in the CVRA impliedly repeals that authorization. Of course, “[i]t is hornbook law that

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<sup>2</sup> This authority is confirmed by the All Writs Act, which also authorizes the Supreme Court to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. 1651(a).

repeals by implication are not favored.” *Beall v. United States*, 336 F.3d 419, 429 (5<sup>th</sup> Cir. 2003) (internal quotations omitted).

Further confirming this conclusion is the fact that section 3771(d)(3) in the CVRA bars only those stays sought “for purposes of enforcing this chapter.” Congress obviously intended to allow stays to be sought for other purposes. Here, the victims are seeking a stay “to enable [them] to obtain a writ of certiorari from the Supreme Court,” 28 U.S.C. § 2101(f), as specifically authorized by Congress.<sup>3</sup>

This five-day stay provision is also inapplicable here because the Fifth Circuit granted the crime victims’ mandamus petition below “in part.” From February 28 through May 7, 2008, the Fifth Circuit barred the district court from moving forward to accept the plea. The February 28<sup>th</sup> order imposing the stay reads:

IT IS ORDERED that the petition for writ of mandamus is GRANTED in part. The district court is to take no further action to effect the plea agreement at issue, pending further ruling by this court, after a response has been filed by the government, as well as by the district court if it elects to do so. Pet. App. 45a.

This order was lifted on May 7, 2008, when the Fifth Circuit entered its opinion on the merits. By virtue of the Fifth Circuit’s local rules, the mandate in the case issued immediately. Fifth Circuit Rule 41.4. The transmittal letter accompanying

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<sup>3</sup> If § 3771(d)(3) is read as blocking the victims from obtaining a stay here, serious separation of powers questions would arise. Precluding the victims from obtaining a stay may have the practical effect of depriving this Court of jurisdiction to review their claims (and claims from other similarly situated crime victims in future cases). Since time immemorial, this Court has had power under the All Writs Act to issue “all writs necessary or appropriate in aid of [its] . . . jurisdiction.” 28 U.S.C. 1651(a). This Court should not lightly impute to Congress the intent of prevent crime victims from having the same opportunity as other litigants to secure Supreme Court vindication of their rights. *Cf.* 18 U.S.C. § 3771(a)(8) (guaranteeing crime victims the right “to be treated with fairness”).

the opinion states the opinion “is issued as and for the mandate.” Pet. App. 54a. Thus, the May 7<sup>th</sup> opinion dissolved the stay contained in the February 28<sup>th</sup> order.

In light of the February 28<sup>th</sup> order, the victims in this application are not asking this Court to create a new stay in the first instance. Instead, they are asking that the mandate stemming from the Fifth Circuit’s May 7th decision dissolving the previous stay order and partial grant of mandamus should be stayed – thus reimposing the stay entered by the February 28<sup>th</sup> order and preserving the status quo that has existed since February 28<sup>th</sup>.<sup>4</sup> The victims are plainly entitled to seek such relief under § 2101(f). Section 2101(f) provides that “the execution and enforcement of such *judgment or decree* may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.” The May 7<sup>th</sup> mandate is plainly a “judgment or decree,” the enforcement of which the victims are entitled to seek to stay. Accordingly, for all the reasons the victims have explained, the Fifth Circuit’s May 7<sup>th</sup> mandate lifting the stay of further District Court proceedings should itself be stayed, thereby reimposing the February 28<sup>th</sup> stay of District Court proceedings and giving the victims a fair opportunity to file a petition for a writ of certiorari with this Court.<sup>5</sup>

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<sup>4</sup> The Fifth Circuit’s stay entered on February 28 did not itself violate Section 3771(d)(3)’s prohibition of stays longer than five days because the Fifth Circuit’s order constituted a partial grant of a writ of mandamus for the victims. Moreover, neither the United States nor BP Products ever argued below that the stay entered on February 28<sup>th</sup> was improper. Accordingly, the power of the Fifth Circuit to stay proceedings from February 28<sup>th</sup> onwards is not pat of the uncontested law of this case.

<sup>5</sup> For the reasons just explained, the victims believe that a stay of the Fifth Circuit’s May 7<sup>th</sup> mandate would reimpose the February 28<sup>th</sup> stay. In the court below, however, BP Products argued that his position was incorrect and that a new stay is required to stay further proceedings in the District Court. If BP Products is correct in its argument, the victims respectfully ask that this motion serve as a request for such a new stay and that the new stay be entered.

### **III. NO DEFERENCE IS OWED TO A ONE-SENTENCE, UNELABORATED ORDER DENYING A STAY.**

In some circumstances, a Circuit Justice may give some measure of deference to the lower court's decision to deny a stay application. In this case, however, any such deference would be inappropriate. A single judge of the Fifth Circuit entered an unelaborated, one sentence order denying the victims' request for a stay. The victims have explained why that decision was incorrect and thus the stay should issue. *See Houhcins v. KQED, Inc.*, 429 U.S. 1341, 1345 (1977) (Rehnquist, Circuit Justice) (deference to lower court denial of stay "does not relieve me of the obligation to decide the issue").

### **CONCLUSION**

For the foregoing reasons, Alisa and Ralph Dean and the other applicant victims of crime respectfully request that this Court stay the mandate of the May 7<sup>th</sup> judgment and decree of the Fifth Circuit below, thereby reimposing the Fifth Circuit's February 28<sup>th</sup> stay of district court proceedings in this case. The victims request a stay for a period of 60 days from the filing of this application, to and including Monday, August 25, 2008, to permit the filing of a petition for a writ of certiorari. Upon filing of such a petition, the victims request that the stay remain in place until the Court's disposition of the petition.

Respectfully submitted,

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ATTORNEYS FOR RALPH AND ALISA DEAN AND OTHER CRIME VICTIMS

JUNE 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of June, 2008 the foregoing Application for Stay of Enforcement of Judgment or Decree Pending the Filing of and This Court's Consideration of a Petition for a Writ Certiorari was served upon the following:

Honorable Lee Rosenthal  
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Honorable Jerry E. Smith  
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## ATTACHMENTS

- Attachment A: District Court Memorandum Opinion and Order, dated February 21, 2008 (Pet. App. 1a-44a)
- Attachment B: Courts of Appeals Order, dated February 28, 2008 (Pet. App. 45a).
- Attachment C: Court of Appeals Opinion, dated May 7, 2008 (Pet. 46a-53a)
- Attachment D: Court of Appeals transmittal letter, Opinion issued May 7, 2008, “as and for the mandate” (Pet. 54a)
- Attachment E: Court of Appeals Order Denying Petition for Rehearing *En Banc*, dated June 3, 2008 (Pet. App. 56a)
- Attachment F: Court of Appeals Order Denying Victims’ Motion for Recall of Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari, dated June 11, 2008 (Pet. App. 57a).